

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE SEPTEMBER 11th LIABILITY :	<b><u>ORDER CONDITIONALLY</u></b>
INSURANCE COVERAGE CASES :	<b><u>GRANTING CROSS MOTION OF</u></b>
:	<b><u>CERTAIN UNDERWRITERS AT</u></b>
:	<b><u>LLOYDS</u></b>
-----X	03 Civ. 0332 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

On February 23, 2005 I issued my Opinion and Order Regulating Additional Depositions, ruling on Zurich American Insurance Company's ("Zurich") motion to take additional depositions. I now rule on the Cross Motion made by Certain Underwriters of Lloyds, London and Terra Nova Insurance Co. ("Certain Underwriters").

Certain Underwriters's role in the case is as follows: World Trade Center Properties ("WTCP") and the Port Authority of New York and New Jersey ("Port Authority") brought a third-party action against Zurich for declaratory relief regarding Zurich's obligations under its insurance to WTCP, and to the Port Authority as an Additional Insured. Zurich filed a fourth-party action and an original complaint against WTCP, the Port Authority, and others, raising similar issues. These third- and fourth-party actions were consolidated for pre-trial proceedings in the current case, 03 Civ. 0332.

Certain Underwriters is both a primary and an excess carrier for the Port Authority. It contends that since the Port Authority is insured by Zurich as an Additional Insured under the insurance program obtained by WTCP, the Port Authority's own insurance should be in excess of that program's insurance.

The Insuring Agreement of the Port Authority Policy states in relevant part:

Underwriters shall only be liable for Ultimate Net Loss in excess of

- (a) amounts recovered by the Assured in respect of underlying valid insurance collectible by the Assured in respect of each Accident or
- (b) USD 3,000,000 in respect of each Accident not covered by underlying insurance.

...

2. **OTHER INSURANCE.** Where the Assured is, irrespective of this Policy, entitled to be indemnified in whole or in part by any other valid and collectible insurance in respect of any claim which would otherwise have been indemnifiable in whole or in part by the Underwriters of this Policy then the insurance afforded by this Policy shall be in excess of such insurance and there shall be no contribution or participation by the Underwriters of the Policy on the basis of deficiency, concurrent or double insurance for such claim or that part of such claim for which the Assured is entitled to be indemnified by such other insurance.

The Zurich binders also address this issue. Although Zurich is a primary insurer of the WTCP, for which the Port Authority is an additional insured, the policy is written as an excess policy for certain situations. The relevant portions of the Zurich binders state:

4. **Other Insurance.** If other valid and collectible insurance is available to the insured for a loss we cover . . . our obligations are limited as follows:

**b. Excess Insurance.** This insurance is excess over: (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

...

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty . . . to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

...

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not brought specifically to apply in excess of the Limits of Insurance shown in the Declaration of this Coverage Part.

Neither the Port Authority policy nor the binders for the World Trade Center insurance, however, indicate which insurance must be the first to cover any qualifying excess losses. The

ambiguity is compounded by the broad complaint of the plaintiffs arising from the terrorist-related aircraft crashes of September 11, 2001.

Certain Underwriters proposes that it wishes to take depositions of various Zurich personnel to resolve ambiguities between the two insurance programs. This issue has been present in the case from the outset. Certain Underwriters first was concerned with Zurich's delayed admission that the Port Authority was an Additional Insured. At the March 2, 2004 Status Conference, I ordered that the parties would proceed with discovery on all questions, but limited to 20 depositions. Various parties have referred to this as a "first wave" of discovery. However, at no time did I state that there would be a "second wave", but only a right to make application for more discovery, and to object to more discovery. Certain Underwriters decision to wait on the sidelines to see how the so-called "main issues" played out reflected their strategy, not my orders.

At the June 25, 2004 Status Conference, Certain Underwriters participated in a discussion about how best to make available a certain witness located in London. At that same conference, the Excess Carriers behind Zurich suggested that the depositions of Excess Carrier parties should wait until the initial Zurich issues were resolved. I demurred, and commented explicitly that this approach would produce delays, and I denied the request. Counsel for Certain Underwriters did not make any further statements or requests at this conference.

At the September 29, 2004 Status Conference, counsel for Certain Underwriters raised the issue of the scope of Zurich coverage. I commented that I would decide this issue when it is formally before me on motion. Certain Underwriters stated that they were proceeding with a deposition related to this issue, and were aware that discovery was proceeding as to all issues pursuant to my order following the April 16, 2004 conference.

With this background, Certain Underwriters lacks proper standing to complain that they lacked opportunity to take depositions. If, nevertheless, they seek discovery, they must show cause. They must be specific and cite the precise discovery they need and the reasons therefore, consistent with my rulings in In Re September 11th Liability Insurance Coverage Litigation, 2005 WL 425267 (S.D.N.Y. February 25, 2005); In Re September 11th Liability Insurance Coverage Litigation, 333 F.Supp.2d 111 (S.D.N.Y. 2003), and they must explain why such discovery was not previously pursued.

### **CONCLUSION**

Certain Underwriters' cross motion is granted, but only to the extent provided in this Order. This showing of good cause must be made by March 15, 2005.

SO ORDERED.

Dated: New York, New York  
March 8, 2005

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ALVIN K. HELLERSTEIN  
United States District Judge